MATERIALS ON CONFLICT OF LAWS

Volume 3A

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

Faculty of Law

University of Toronto

and

Dalhousie Law School

MATERIALS ON CONFLICT OF LAWS

Volume 3A

Professor John Swan

and

Professor Vaughan Black

1987 - 1988

We are grateful for the help that has been given over the years by Alice Ng, who worked on revisions of these materials for thirteen years. That she is now in business for herself may say something about the stamina required in that task. We are also grateful for the help of Nina Lester and of many other students over the past several years in the constant revisions in the organization and text of these materials.

For the first time these materials are showing the results of the work and interest of Professor Vaughan Black of Dalhousie University, who is sharing the task of making these materials ready for publication.

TABLE OF CONTENTS

VOLUME 3

INTRODUCTION

The conflicts problems of family law present the same features as the conflicts problems of contracts and torts. In one sense, the problems are more serious: the legal problems are frequently much more important for the parties, and we have to be much more concerned that the solutions we reach are satisfactory. Recent legislation in Ontario and other Canadian provinces has, to some extent, relieved the conflicts problems so that some traditional areas of difficulty are of far less significance now than they were some years ago. Conversely, the great upheaval that has occurred in the domestic law of the Canadian provinces has created new problems. As we saw in our examination of the conflicts problems of Contracts and Torts, the Conflicts problems of Family Law are parasitic on or derived from the problems we encounter in our own law, and in the principles that we use there.

Once again, it will be necessary to examine the process of reasoning about conflicts problems to discover how one should reason and what happens if one adopts one process of reasoning rather than another. The basic conflicts problems of the choice of law process, jurisdiction and recognition of foreign judgments remain.

You will remember from your introductory courses in Contracts and Torts that a beginning of an understanding of the law was the realization that a maxim like, "Pacta sunt servanda" expressed, at best, no more than an ideal or a starting point for legal reasoning. It could never operate as a rule to be applied to all cases of contracts or promises. Yet at the same time you knew, or tried to hang onto the feeling or belief that, back of the contract and tort cases, rules and principles, there were some fairly important and basic moral ideas and, what is more important, that these mattered. Such knowledge or such a belief has to be kept in control and has to become or be regarded as an objectively existing preference for certain values. In other words, to be able to reason usefully about contracts or torts problems, one has to be able to stand back from one's moral feelings and assess their strength and relevance. The same distancing process has to be undertaken for economic, social or political values. Sometimes this distancing process is hard both

to accept and to undertake. Our intuitive preferences are often very seductive and, of course, so obvious valid to any right-thinking person!

One of the most difficult of all intellectual exercises that one encounters in dealing with the law is in doing the same kind of distancing in regard to our views of the family. It is precisely because it is so difficult to get a perspective on our views of what is morally, doctrinally, or sexually right that it is essential to try and to succeed. We cannot begin to handle the legal problems of families unless we realize that feelings and beliefs that we think are obvious and eternally valid are often little more than instinctive prejudices that we have simply accepted with little or no thought because of how we were brought up, educated or indoctrinated by some religious teaching. The ability to maintain a perspective on our beliefs allows competing ones that we could quite easily accept. Such a perspective is of paramount importance in developing any kind of useful or satisfactory approach to conflicts problems. Such problems are, as you now know, the most likely to force us to see our solutions as only one of at least two, any one of which could very easily be defended.

A very large part of our problems in this course arises from the fact that courts have been unable to achieve any kind of distance from the values that the judge holds or believes that the law represents. It is not sufficient for us to see this and to criticize. We have to realize that those ideas and those values are an important factor to be considered in any effort to make sense of the problems that we face. Of course, if those values are either irrational (in the sense that they are inappropriate to achieve what is intended by the person who holds them) or simply too absolute (in the sense that no compromise is possible) we will find that we have large problems of dealing in any useful way with them. We may have no choice but to accept that (maybe for the moment, at least) they represent the value that the court must forward or believe that it is forwarding.

The purpose of our investigation here are the same as in the first volume of these materials. You have to understand what the courts are doing, how they now reason and what the nature of the rules that they apply is. At the same time, we have to have an understanding of what it is that the rules are for and of how that goal can best be achieved. Once again, to talk of what the rules <u>should</u> be is not an idle academic pastime. It provides what is the only sound basis upon which to advise clients in anything but a clear case and the only possible way for helping your client if, in a "clear case", he or she is likely to end up with the short end of the stick. The actual problems that can

arise are more exotic and extraordinary than any we could imagine. Often they present human dramas of the most moving kind, and the story of the parties' lives is a vivid reminder of what wars, passions and sheer bad luck can mean to the individual men, women and children affected. It hardly needs to be said that such problems present nearly insuperable difficulties for the law in reconciling all or even some of the conflicting pressures that must be acknowledged.

Domicile ...

Notes:

1. The traditional English view of the intention necessary to support the acquisition of a domicile of choice was based on the belief that it was nearly incomprehensible that an Englishman would ever want to change his domicile to some other jurisdiction. The cases already mentioned where the rule was laid down with uncompromising severity were, however, a case involving an American, Winans v. A.G., [1904] A.C. 287, and a Scotsman, Ramsay v. Liverpool Royal Infirmary, [1930] A.C. 588.

2. As you will have noticed, the concept of domicile is independent of the purpose for which it is being used. The most obvious fact to demonstrate this statement is that texts like Dicey & Morris, Cheshire and North and Castel discuss the concept at the beginning of their works and nothing turns on the issue before the court. This placing of the discussion in those texts indicates that the concept can be "factored out" of the cases where it is applied and treated like an all-purpose tool, equally well adapted to dealing with the question whether a particular court is the appropriate court to dissolve a marriage or whether a man's estate should go as his will directs or as some rule restricting testamentary capacity should direct.

3. It is significant, for example, that Winans was a tax case (many of the English cases are tax cases: liability to British tax being based on domicile rather than residence) and the deceased's liability to tax depended on his being domiciled in England. The House of Lords held against the taxman. In Ramsay the validity of a gift by will to a charity depended on the deceased's dying domiciled in Scotland. The House of Lords held in favour of the charity. To what extent are the issues the same as those raised where the court has to determine whether one Canadian court can properly hear a petition for divorce? The English courts are not immune to the pressures to reach sensible decisions and, to take two cases out of many, May v. May, [1943] 2 All E.R. 146 and Cruh v. Cruh, [1954] 2 All E.R. 545, suggest that the courts are in practice concerned about the effects of their decisions. You must keep the purpose of the inquiry into a person's domicile firmly in mind as you read the cases.

4. It would not be hard to raise all kinds of awkward questions involving the application of the common law rules of domicile. The exams set by Conflicts teachers years ago are full of them. The judgments that you have just read are all too typical of Canadian judging. No effort is made, even by the Supreme Court, to consider its own previous judgments, and, as you can see, the law is inconsistent and unpredictable.

5. The next case establishes one of the most startling propositions of the common law. The case deals with what must be a common occurrence in individuals' lives, that is when a person (ex hypothesi an adult male or an unmarried adult woman) leaves a domicile of choice with no intention of returning; where one, so to speak, shakes off the dust of that domicile from one's feet. It is an axiom of the common law that no one can be without a domicile, so what is to happen when a person leaves a domicile of choice with no intention of returning or, possibly intending never to return? It is this question that the next case answers.

Notes:

1. It should be apparent now that whatever functional basis the concept of domicile may have at its core, at the periphery it is nothing more than some arcane game that conflicts cognoscenti play for amusement when they have nothing better to do with their time. It is merely an unfortunate consequence of no particular significance that individuals' lives get caught up in these games.

2. The consequence of the decision in Udny v. Udny was that the respondent was saved from the awful consequences of bastardy. We cannot easily tell how much force this result might have had in moving the court to the conclusion it reached. By that date the attitude of the common law to legitimation per subsequens matrimonium was becoming hard to defend. Legitimation, that is the becoming legitimate by one's parents' marriage afterbirth, had been known to the civil law systems (through the canon law) for about a thousand years. The attitude of the common law was supposed to have been fixed by the Parliament of Merton in about 1250 when the barons were alleged to have cried with one voice, "Nolumus leges Angliae mutare", when it was suggested by the bishops that legitimation per subsequens matrimonium be allowed. The common law remained unchanged until 1926 - ample time for a second thought.

3. The American rule was never the same as Udny v. Udny. Then a domicile of choice persisted until a new domicile of choice was acquired. To Lord Westbury's question, "... is it meant to be said that [a natural-born Englishman] carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaceously until he has finally setup his tabernacle in another country?" the American answer is that it is certainly no less absurd (and probably a good deal more absurd) to have a domicile of origin revive than to have a domicile of choice persist. The latter is at least likely to have been one chosen by the person rather than one assigned to him or her at birth. The American case is In Re Estate of Jones (1921), 182 N.W. 227. The court in that case explains the English view on the ground that it fitted in well with nineteenth century English views of what was only right and proper: it "was a recognition of the desire on the part of the English trader in distant lands to have his estate administered according to the laws of the land of his birth."

4. At common law the domicile of a child was the same as and changed with that of his or her father, though in exceptional cases it could depend on the child's mother. A married woman's domicile was the same as and changed with that of her husband. There were no exceptions to this rule: the proof of the truth of this statement is provided in the following case.

Domicile ...

Notes:

1. Notice the authorities relied on by Lord Merrivale. Mrs Cook would, no doubt, have felt that the views of Bracton (who lived about 1250) were particularly relevant in Alberta in the twentieth century. One may doubt that she thought much of Coke or Blackstone either.

2. The Family Law reform Act, 1978 changed the rules of the common law regarding the domicile of a wife. The Family Law Act, 1985 provides:

> **64** —(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.
>
> (2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and, in particular, has the same right of action in tort against his or her spouse as if they were not married.
>
> (3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference in it resulting from any common law rule or doctrine.

3. The law in England was changed in 1974: Domicile and Matrimonial Proceedings Act, 1973, s. 1. Not all provinces have changed the common law rules. British Columbia and Nova Scotia, for example, have not yet changed the common law rules.

4. The rules for determining the domicile of children were changed at the same time: the Family Law Act, 1985.

> **67.** The domicile of a person who is a minor is,
>
> (a) if the minor habitually resides with both parents and the parents have a common domicile, that domicile;
>
> (b) if the minor habitually resides with one parent only, that parent's domicile;
>
> (c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or
>
> (d) if the minor's domicile can not be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

child's domicile = where they reside

5. The Divorce Act, 1985 does not use the concept of domicile: residence of the petitioner or respondent being the only factor determining the power of a court to take jurisdiction to dissolve a marriage.

6. It is with some small sense of regret that, in Ontario at least, it is no longer necessary to explore the full consequences of the common law rules regarding a married woman's domicile. There are a number of cases that are among the saddest vignettes of Victorian of English social history. They include cases where the problems of widows' domiciles are discussed. If you want to read them they include:

In re Raffenel (1863), 3 Sw. & Tr. 49; 164 E.R. 1190,

Re Wallach, [1950] 1 All E.R. 199, and

Re Scullard, [1957] Ch. 107; [1956] 3 All E.R. 898 (Ch. D.)

7. As has been stated, the concept of domicile relates a person to a territorial unit: a person is domiciled in Ontario, England etc. Ontario is a province of a larger federation, Canada. For certain purposes it was important that a person be domiciled in Canada rather than Ontario. The jurisdictional requirements of the Divorce Act, 1968, were that the petitioner be domiciled in Canada and resident in the province in which the petition was brought. For other purposes (principally succession to movable property) a person must be domiciled in Ontario for Ontario law to be applicable. The issue before the court determined whether the tests required are applicable to a Canadian or a provincial domicile. The possibility existed, and may even now still exist, that while a person who has an Ontario domicile must be domiciled in Canada, a person domiciled in Canada might have no provincial domicile. An immigrant who comes to Canada intending to remain may have the necessary intention to stay in Canada, but be unsure of what province he or she wants to live in, and, therefore, be unable to have the necessary intention to acquire a domicile in a province.

8. It was an axiom of the common law that a person could only have one domicile. The possibility of a person having a Canadian and provincial domicile was regarded as an exception to this axiom, and learned articles were written on it: Cowen and Mendes da Costa (1962), 78 L.Q.R. 62; Mendes da Costa (1968), 46 Can. Bar Rev 252. There is nothing particularly startling about a person having two domiciles in the sense discussed above, for it simply reflects the fact that Canada is a federation. Only an English perspective regards the possibility of two domiciles as unusual.

Domicile ...

9. Some further problems should be mentioned. Problems of domicile occasionally arise when the person in question is an illegal immigrant to Canada. The question is whether such a person can acquire a domicile here. The better view (i.e., the view that is more likely to be accepted than its opposite) is that the question of a person's common law domicile is independent of his or her status under Canadian immigration laws: Jablonowski v. Jablonowski, [1972] 3 O.R. 410, cf. Bednar & Bednar v. Deputy Registrar General of Vital Statistics (1960), 24 D.L.R. (2d) 238.

10. We saw in Stephen v. Stephen that special problems can arise in the case of a member of the armed forces. An example of the courts' attitude to domicile, or more accurately, to a change of domicile is provided by Wilton v. Wilton, [1946] O.R. 117; [1946] 2 D.L.R. 397. Such cases are really extraordinary and completely unjustifiable in a federal state. To require a high standard of proof for a change of domicile is simply silly for really very little depends on it. It seems that there is a real risk that we cannot escape the attitude of nineteenth century English judges and their xenophobia and chauvinistic patriotism.

11. The next case is an example of how the traditional rules for determining a person's domicile are applied. Is it only by coincidence that the result might make sense? Try to play the game with the degree of detachment that the true domicile aficionado requires for full enjoyment.

MARRIAGE

1. Introduction

We all think that we know what marriage is for and what the consequences of marriage are. A brief study of the conflicts cases on marriage should quickly convince us that here "certainty generally is illusion and repose is not the destiny of man." For every case where the application of one rule appears to make sense, another case can easily show that the rule cannot now be sensibly applied. As you would by now expect, the result is that the cases and the law are in some confusion. This, however, does not mean that there are not principles that can be discovered and used. The problems of understanding the issues of marriage arise from the fact that in our society the presence or absence of a marriage can have an impact on the legal issues in an extraordinarily wide range of situations. The following list includes some of the more obvious examples of the importance of marriage:

1. Rights of support
2. Legitimacy of children
3. Rights of succession
4. Tax (attribution, deductions)
5. Criminal law
6. Torts (interspousal immunity)
7. Evidence (non-compellability of spouse and privilege)

We tend to think of marriage in the abstract, i.e., we ask "Is the person married?" or, "Is Tom married to Mary?" We naturally assume that an affirmative answer to either question will automatically result in there being an obvious answer to the issue of the relevance of marriage in any of the examples that I have listed. In other words, we assume that if Tom is married to Mary, then Tom can get maintenance from her, that he cannot be compelled to testify against her and that his income may be attributed to her under the Income Tax Act. This approach is sometimes dignified by saying that marriage created a <u>status</u>.

If we were to think about the issues that have been listed in ways that did not involve the notion of status, we might conclude, for example, that the answer given to the question of whether Mary should support Tom (or <u>vice versa</u>) might not

necessarily conclude the issue of whether she should be compelled to give against him at a criminal trial.

they sometimes struggle to reach sensible results in the cases that come before them. Once we inject a conflicts issue the problems are both much more difficult and much more open to manipulation. An understanding of what is going on requires, therefore, a careful disentangling of the issues.

Provincial law has avoided many of the problems, that until quite recently, caused great difficulty. Thus, it is now no longer necessary for people to be married before one person can be compelled to support the other. See: Family Law Act 1985, s. 29; Family Maintenance Act, S.N.S. 1980, c. 6, s. 2(m) and s. 3 (spouses, including those who have co-habited for longer than one year but are unmarried), s. 9 (dependent children), and s. 15 (dependent parents); Family Relations Act, R.S.B.C. 1979, c. 121, s. 56 (children), s. 57 (spouses which includes those who have co-habited for at least two years), and s. 58 (dependent parents). The impact is that it now becomes unnecessary to determine if there is a marriage before Mary can be compelled to support Tom, and this, in turn, means that some potential conflicts issues never get off the ground. Somewhat similar results occur in cases of succession, and, of course, Ontario law has now largely by-passed the perennial problem of the legitimacy of children. (Children's Law Reform Act (CLRA) R.S.O. 1980, c. 68, s. 1). In spite of this, the problem of marriage as a status remains, and it is, therefore, necessary that we be able to answer the questions that arise in this situation. As you read the cases, however, keep clearly in mind what the real issues are. The typical issues are likely to be one of the following:

1. Can this man be compelled to support this woman or this child?

2. Can this woman succeed to this man's estate as his widow?

3. Is this child the legitimate child of this man?

4. Is this woman validly married to this man, given that she went through a ceremony with another man beforehand?

You will have to consider how well the judgment has responded to the need to find a satisfactory resolution of the issues.

One further general problem should be mentioned. The common law (i.e., the law apart from recent acts like the FLA and the Succession Law Reform Act, R.S.O. 1980, c. 488 (SLRA), generally speaking, ignored any relationship between a man and woman that

was neither that of parent and legitimate child nor husband and wife. Thus a woman's rights to support depended entirely on the fact of a valid marriage. Similarly, only a wife could claim to be entitled to the privileges given by the law of evidence: (Ex p. Coté (1971), 22 D.L.R. (3d) 353.) The consequence was that there was a strong pressure to hold that there was a valid marriage. So strong was this presumption that the existence of a marriage would be assumed from long co-habitation alone. Thus in the common law system, most problems could be more satisfactorily sorted out by holding the parties to be validly married. The conclusion that there was no marriage would generally mean that reliance would go unprotected, that an estate would be disposed of in ways that probably would not represent the intentions of the deceased, or that the integrity of a relationship would be violated by the forced disclosure of private communications.

It is important to realize, however, that there is nothing inevitable about this. It has already been suggested that quite different questions could be asked in the course of resolving the issues that have been mentioned. The analysis of some conflicts cases discloses that civil law jurisdictions, for example, may attach far less importance to marriage in that rights of support and succession may arise from a putative marriage, a supposed or reputed marriage, i.e., a marriage that is invalid as a marriage but which is, nonetheless treated for certain purposes as a valid marriage. In those jurisdictions, the determination of the status of the parties, therefore, may not dispose of the issue of support. Here we have the same kind of problem that we touched on in Charron v. Montreal Trust, (supra) Vol. 1. We have to be constantly aware of the fact that each legal system has an integrity of its own. Each will sort out, for example, the problem of the support of wives in roughly similar ways. The common law imposes obligations of support on a husband. It makes marriage easy and has a strong presumption in favour of the validity of any marriage. The common law approach can be seen, of example, in the following provision of the Ontario's Marriage Act, R.S.O. 1980, c. 256:

> s. 31. If the parties to a marriage solemnized in good faith an intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and co-habited as man and wife, such marriage shall be deemed a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage, and notwithstanding in the publication of banns or the issue of the licence.

The civil law permits a woman to make a claim on the basis of a putative marriage. The civil law can, therefore, make it much more difficult to get married because the effects are not quite so drastic as they would be in a common law setting.

We shall see that serious problems arise when we mix incompatible regimes. It can be argued, for example, that the first case we shall look at sent the Anglo-Canadian courts off in a fundamentally wrong direction because in an unacceptable way, the court mixed the civil and common law approaches to marriage. Later cases show that the courts simply could not live with that approach. The problems are all intensified when we add in the problem of divorce. It is sufficient to note here that, as a very general proposition, it appears to be true that the more readily available divorce is, the more readily parties can be held to be married. The more difficult divorce is, the more impediments there are to a valid marriage. The formal prohibition of divorce has, for example, never prevented people from getting out of unsatisfactory relations provided that they had enough money or power (e.g. Henry VIII).

One final point to remember is that people generally regard marriage as important. It is tied up with complex and pervasive ideas of religion, morality and biology. We do not have to investigate these issues here, but the courts' views on these issues are often the unstated premise of the judgments. Radically different ideas can be suggested, but in a very real sense they are little more than idle academic musings. Marriage is regarded by many people as too important to be made light of. Therefore, we can only carry a rational analysis to a certain point. At that point we are forced to concede that we cannot ignore that in Canada, for example, marriage is important and that certain legal consequences cannot be further argued about but must be accepted. The precise legal problem raised is that many of the rules we are forced to apply appear to be essentially purposeless. Any legal analysis is very difficult.

The result is that the investigation of these problems is both interesting and difficult. It goes without saying that in many cases there are no easy answers and that we can properly disagree on how the problems should be resolved.

The following extracts set out some of the modern problems that centre on the importance of marriage. Note that in Ontario, a woman who is not married may succeed to the estate of a man with whom she lived only under the Succession Law Reform Act, R.S.O. 1980, c. 488, which provides:

What is the juris'l rule for support succession once m. is found void?

Formalities of Marriage ...

Notes:

1. Berthiaume v. Dastous suggests that the choice of law rule governing the formal validity of the marriage is that the marriage must satisfy the formal requirements of the place where it is performed. This rule is, apparently, mandatory. It is not only sufficient that the marriage comply with the rules of lex loci celebrationis (hereinafter abbreviated as l.l.c.): it is necessary. This rule has been hallowed by successive editions of Dicey & Morris, Cheshire and Castel. The last named author says: "The settled general rule is that the formalities of a marriage are governed by the law of the place of celebration. This is an application of the maxim locus regit actum." (Castel, vol. 2. p. 79).

2. The rule in Berthiaume v. Dastous has always been accepted without question. The following points might be noted:

(a) This case arose on appeal from the courts of Quebec, and might have been regarded as of little relevance in the common law.

(b) The conclusion that the marriage was valid or void had possibly some, but more probably little, bearing on the issue whether the woman could obtain maintenance form the man. It also appears likely that the validity of the marriage would have had no effect on the legitimacy and the right of any children to succeed to their father's estate. To regard the marriage as invalid is, therefore, not necessarily a drastic step. (It must, of course, be recognized that the emotional and psychological impact of the decision on the woman might have been severe. To a large extent the law has to take a much cruder approach. The law cannot make people love and respect each other. It can do little more than protect rights to support and succession. In law, issues of marriage nearly always translate sooner or later into issues of money.) To apply this case to the common law (and to ignore, for example, the strong policy represented by the Marriage Act, s. 31) is to invite disaster. In the common law context this effect of the decision can have very serious consequences for the parties.

(c) The civil law systems generally provide that compliance with the l.l.c. is sufficient but not necessary. Why does Lord Dunedin refer to the rule as a rule of "international law"? (Perhaps the civil law countries create for themselves the problems that arise from the mixing of incompatible regimes, but that is their problem.)

(d) It is, as a matter of fact, extraordinarily hard to find cases other than Berthiaume v. Dastous itself where the effect of the rule is to make a marriage invalid. The bulk of the discussion in the textbooks is either on some odd problems like the following cases or on exceptions to the rule that, had the rule been otherwise, need never have caused difficulty.

3. Special problems have arisen with proxy marriages. A proxy marriage is a marriage in which one of the parties is not present, but authorizes someone else to act as agent for the purpose of consenting ot the marriage. Such marriages are unknown to the common law, but are perfectly valid in the civil law. They are valid under the rule of Berthiaume v. Dastous if the marriage ceremony takes place in a jurisdiction where such marriages are effective: Apt v. Apt, [1948] P. 83; [1947] 2 All E.R. 677, Frustaglio v. Barbuto, [1960] O.W.N. 551. An argument has been made that they can be supported under the Marriage Act, s. 31: Canter, (1957) 35 Can. Bar Rev. 1195.

4. The strength of the common law presumption in favour of marriage is strongly supported by the presence of a provision like s. 31 of the Ontario Marriage Act. The provisions of the B.C. legislation do not offer quite so strong an argument, but neither do they undercut validity of the presumption nor suggest that it is irrelevant.

5. The issue raised by Berthiaume v. Dastous and the conflicts issues of marriage is the correct way to approach the problem. In other words, how do we begin to think about the issue of whether a couple are validly married or not? This issue will dominate much of the remainder of these materials and cuts right to the heart of the purpose of our rules and how we should think about them. The basic common law position is that there is a strong presumption in favour of the validity of a marriage, s. 31 of the Marriage Act is not so much an example of the presumption as it is of the same concern expressed in the substantive law.

6. When we talk about there being a presumption, we have to ask, "What triggers the presumption?" There are two facts that raise the presumption. One is evidence of a marriage ceremony, the other is long co-habitation of the parties who are alleged to be married. When we consider these facts in a wholly Canadian context we have a fairly good idea of what facts are likely to present evidence of a marriage ceremony and of the significance of co-habitation. Very little changes in the majority of cases int he conflicts context. Almost all of the cases we or any Canadian court are likely to consider will be cases arising in the Western tradition, that is, in the Judeo-Christian concept of marriage and family. We do not, therefore, have to worry much about more exotic forms of social arrangements. If polygamy or

polyandry, for example, were common, we would find it very hard to express our values in an idea that we would presume any marriage to be valid. Since conflicts cases can raise problems of polygamy, we may find that we have to be careful how we generalize our principles over the full range of problems that we might encounter.

7. For the majority of cases that we will consider we can start our process of reasoning by saying that if there is evidence of a ceremony of marriage, the onus is on the person who argues that it is invalid to show that that conclusion must be drawn. Similarly, if the parties whose marriage is in issue are dead but lived together as husband and wife, we can assume a marriage ceremony and force the person who would deny that there was a marriage to prove it. An analogous proposition can be developed in regard to contracts. A contract with the affidavit of a subscribing witness. Somewhere in the middle there is the kind of arrangement that causes the problem of the "Battle of the Forms". We cannot call the arrangement a contract without automatically precluding the question we have to consider, viz. what are the terms of the arrangement that the parties made? It is sufficient that we have a general idea of what will operate to raise the presumption. This idea takes its form from our understandings of how people typically act and of what kinds of expectations and reliance are likely to follow from certain acts of one party. Thus we justify starting from the presumption of validity in contracts because such a position is more likely to protect the parties' reasonable reliance on the mutual understandings which they believe constitute the arrangement.

8. Similarly in marriage. We do not justify the presumption in favour of marriage because of some moral belief that people who live together should be married but because the fact of cohabitation or of a ceremony typically will cause one party (usually the wife) to rely on the other in certain clearly understood ways. So far as the law is concerned, the repeal of criminal sanctions against fornication means that we are only really concerned about the existence of a marriage and reliance thereon in so far as it provides a basis for financial support. What triggers the presumption is, therefore, the likelihood that what the parties did create in one party reasonable reliance on the other for financial support or the reasonable expectation of such support.

9. Unfortunately the law of marriage is, whether we like it or not, closely bound up with moral views and expresses a position on important moral questions. The effect of this fact is that our efforts to recognize the force of the arguments based on reliance are seriously compromised. The need to compromise

arises because we have rules regarding bigamy. A marriage will be invalid because one of the parties was married at the time he or she went through the subsequent (second) ceremony of marriage. We cannot, therefore, give effect to our concern for anyone's reliance on a second marriage because evidence of the previous marriage forces us to hold the second marriage invalid.

10. The problem of deciding when or how to start reasoning about the issue of the validity of a marriage is not changed by the recognition of the effect of our rules regarding bigamy. We still can justify the presumption in favour of marriage because that is most likely to lead to sensible and satisfactory decisions even though we knew that we may be forced to adopt a solution in the individual case which we know will defeat one party's reliance or reasonable expectations.

11. As you read the next case consider how you think the process of thinking about the marriages should begin and when it should end. Consider some of the obvious factual variations and whether your analysis allows for different results and whether these are more or less satisfactory than others that are possible. What effect does the fact that this is a conflicts case, that is, a case with geographically complex facts, have on any aspect of your or the court's analysis? Does the conflicts aspect of the case provide flexibility that would be denied were it a case wholly in England, Austria or Canada? Do you think that the court had adequate information about the law of Austria? If not, what further information would you like?

12. Are you helped by the following statement concerning the rules of bigamy?

> Globe and Mail, May 4th 1983, p. 6. SOFT ON BIGAMY
>
> Although death was considered a fitting penalty for bigamists before 1603, it would be regarded by most Canadians as a mite severe for 1983. Ontario County Court Judge Stephen Borins, who has been doing some reading on the history of the offence, is certainly on safe ground in concluding that society's attitudes to marriage have undergone dramatic change in recent times, yet he seems to be running ahead of most of us in assessing the extent of the change.
>
> When he handed Stanley Walter Friar a suspended sentence and ordered him to perform 250 hours of community service for marrying three women without obtaining a divorce, Judge Borins may well have been talking into account some of the curious circumstances of the case, including the fact that Mr. Friar had not deceived any of the women about his

previous relationships. One of them had actually insisted on "marriage".

There is some difficulty, however, in following the judge's reasoning that because people nowadays live together unmarried without scandalizing community or friends, the institution of marriage - the contract of marriage - need no longer be taken very seriously. It might just as easily be argued that the ease with which such associations may now be formed outside marriage leaves the behaviour of the bigamist less, not more, acceptable than before.

In any event, changes in social tolerance of human relationships formed outside marriage should not be confused with changes toward the institution itself. Marriage remains an undertaking to be entered into solemnly and, while this is not always evidently the case, the courts should not hasten it toward some more trivial status.

Formalities of Marriage ...

Notes:

1. The traditional analysis of this case puts it into a category usually called "The Time Factor" or "Time Element". (See, e.g., Dicey & Morris, Chapter 5, Castel, Vol. 1 Chapter 6). This problem is supposed to deal with the issue raised in Starkowski by the fact that the date of reference to the l.l.c. under Berthiaume v. Dastous has to be determined.

2. How can we present the issue raised by Starkowski so that the issue is correctly presented as a marriage issue rather than a conflicts issue? Ie protecting live marriage, present expectations, rel

3. What would happen under the traditional analysis if Henryka had married for the second time before the registration of the first marriage in Austria?

4. The next case raises the identical question as faced the House of Lords in Starkowski. This fact is true even though the issue was presented as one dealing with the capacity of the woman to marry and not with the formalities of the marriage. It is important that you see the case simply as one where there was an impediment to a valid marriage which was subsequently removed.